STATE OF MICHIGAN

COURT OF APPEALS

STRUCTURAL LANDSCAPES,

Plaintiff-Appellee,

v

ROUMEL & CONSTANTINE CONSTRUCTION, INC., LASCELLES PINNOCK, HELEN BYRD, and STANDARD FEDERAL BANK,

Defendant-Appellants.

UNPUBLISHED
November 12, 1999

No. 209934
Oakland Circuit Court
LC No. 93-466218 CK

Before: White, P.J., and Hood and Jansen, JJ.

WHITE, J. (concurring in part and dissenting in part).

I agree that defendant's claim that the arbitrator exceeded his authority by ordering that payment be made from the escrowed funds lacks merit. However, I conclude that the February 4 order[1] does not comply with the arbitrator's decision to the extent that it effectively orders that defendants pay the entire cost of the arbitration.

Although not identified as a separate issue, defendant's brief claims error in the order's provision that the arbitrator be paid out of the escrowed funds.[2] Defendant argued this at the trial level as well. The arbitrator awarded plaintiff $14,600.00 from Roumel & Constantine. The final paragraphs of the award state:

> It is the further decision of the Arbitrator that there is no cause of action against Defendant, Counter-Plaintiff STANDARD FEDERAL BANK except to the extent that STANDARD FEDERAL BANK and/or a title company of their choosing shall not distribute any funds except to satisfy this award.
>
> It is the further decision of the Arbitrator that *each party shall bear their own costs and expenses of these proceedings, which sums shall also be deducted from those funds held in escrow* [Emphasis added.]

While defendant is incorrect in its assertion that the arbitrator did not order that the arbitrator be paid from the escrowed funds, the arbitrator's award did include a provision that each party shall bear its own costs and expenses of arbitration.

None of the escrowed funds had been provided by plaintiff. Thus, under the February 4 order, plaintiff bore none of the expenses of arbitration, and defendants bore all of the expenses. To effectuate the arbitrator's award, the February 4th order should have provided that plaintiff's share of the expenses be distributed from the escrowed funds awarded to plaintiff by the arbitrator. Thus, I would remand for entry of an amended order directing that plaintiff be paid $11,810.63 ($14,600.00, less one-half of the arbitration expense) out of the escrowed funds. The remainder of the order would remain unchanged.

/s/ Helene N. White

[1] The February 4 order provided:

> ORDER CONFIRMING ARBITRATION AWARD
>
> * * *
>
> This matter having been referred to binding arbitration, the arbitrator having rendered an award, and the Court being fully advised in the premises;
>
> IT IS HEREBY ORDERED that the award of the arbitrator, a copy of which is attached to the within Order, is confirmed, and judgment therefore may enter.
>
> IT IS FURTHER ORDERED that the escrowed funds shall be disbursed as follows: $14,600.00 to Plaintiff, $5,578.75 to Joel Sirlin, and the balance of the escrowed funds shall be disbursed to the Defendants.

[2] Defendants argue:

> The provision in the order executed on February 4, 1998 provided for two things that were clearly not in the Arbitration Award nor could they be implied by the wording of the Arbitration Award. These things are surplusage and constitute an attempt to modify the award.
>
> ***
>
> The second portion of the surplusage was that $5,578.75 be paid to the Arbitrator from the Escrow is also surplusage. The Arbitrator's Award is silent as to how the Arbitrator will be paid. The initial order for Arbitration entered by the Court requires the parties share the cost of the Arbitration. Defendants-Appellants would not object if the Arbitration award is modified to add the same provision that the costs of the Arbitrator be shared equally between the parties. However, the surplusage added to the order

places the burden of paying the costs of the Arbitrator only on the Defendant who established the Escrow.